2002

Steve and Catherine Smith v. Mel Frandsen dba Mary Mel Construction Co. : Brief of Appellant

Utah Supreme Court

Stephen Quesenberry; J. Bryan Quesenberry; Hill, Johnson and Schmutz; Attorneys for Appellants.
Michael W. Homer; Jesse C. Trentadue; Thomas B. Price; Suitter Axland; Attorneys for Appellee.

IN THE SUPREME COURT OF UTAH

STEVE and CATHERINE SMITH, Appellants/Plaintiffs, vs. MEL FRANDSEN dba MARY MEL CONSTRUCTION CO., Appellee/Defendant.	)	**BRIEF OF APPELLANTS** Trial Court No. 000402150 Appellate No. 20020248-SC

Appeal From the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Fred D. Howard

Michael W. Homer (1535)
Jesse C. Trentadue (4961)
Thomas B. Price (8254)
SUITTER AXLAND
175 South West Temple, Suite 700
Salt Lake City, UT 84101
Attorneys for Appellee/Defendant

Stephen Quesenberry (8073)
J. Bryan Quesenberry (9156)
HILL, JOHNSON & SCHMUTZ
3319 North University Ave.
Provo, UT 84604
Attorneys for Appellants/Plaintiffs

LIST OF PARTIES

Appellants/Plaintiffs

Steve and Catherine Smith

Appellee/Defendant

Mel Frandsen dba Mary Mel Construction Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Cases

B. Statutes

C. Secondary Sources

I. STATEMENT OF JURISDICTION

Pursuant to U.C.A. § 78-2-2(3)(j), and the Utah Constitution, Art. VIII, § 3, this Court has jurisdiction over the present appeal.

II. STATEMENT OF THE ISSUES

A. Questions Presented

1. Did the court below err when it held that negligent misrepresentation requires contractual privity between the developer and the home-buyer? This issue was preserved below. (R at 705-682.)[1]

2. Did the district court err in ruling that Appellants' fraudulent concealment cause of action requires contractual privity between the developer and the home-buyer? This issue was preserved below. (R at 705-682.)

3. Did the district court err in ruling that developers do not owe home-buyers a duty of care *vis-a-vis* a claim for negligence? This issue was preserved below. (R at 705-682.)

B. Standard of Review

Because summary judgment is granted as a matter of law, a trial court's legal conclusions are given no deference and its decision is reviewed for correctness – i.e. *de*

---

[1] Appellants cite their opposition brief to Appellee's summary judgment memorandum which is numbered backwards (pages 705 - 682) in the record.

novo review. Walker Drug Co., Inc. v La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995).

III. STATEMENT OF THE CASE

A. Nature of the Case

Appellee is an experienced, licensed land developer. Appellants are first-time home-buyers who purchased a house built by GT Investments on Lot 223 of the Summercrest Subdivision in Lehi, Utah. GT Investments had purchased Lot 223 from Appellee and his partner, Patterson Construction, Inc.

A few years after Appellants purchased the house, the house began settling, causing severe damage. Subsequently, Appellants discovered the foundation of their house was built on a former ravine which had been filled in by the developers which, in turn, caused the house to settle.

B. Proceedings Below

Appellants instituted a residential construction defect lawsuit against Appellee and Patterson Construction – who co-developed the Summercrest Subdivision – and the home builders (GT Investments and Joseph Sharp). Subsequently, all of the Defendants below filed for summary judgment, but only Appellee proved successful.[2] Appellants appeal his

---

[2] In awarding Appellee summary judgment, the court below provided no memorandum decision. Rather, the court below simply signed a summary judgment order. (See, Exhibit A). Thus, this appeal brief is based largely on the summary judgment arguments Appellee raised below in his briefing.

summary judgment award.

C. Material Facts

Pre-Development Facts

The Summercrest subdivision was developed by Appellee and Patterson Construction. (R at 704, ¶ 1). When Appellee began grading and developing the Summercrest subdivision, he was grading into virgin country; no one had developed there before. Around this time, Appellee hired Cole Engineering to survey and plat the land. (R at 704, ¶ 3.) (See, Subdivision Map attached hereto as Exhibit F) Cole Engineering conducted its survey just before the lots were platted and developed, in approximately 1992 or 1993.[3] (R at 704, ¶ 4.)

At the time Appellee developed the Summercrest Subdivision, one of the Subdivision's neighbors was Micah Merrill who lived most of his life just to the South of and just below the property which later became Lot 223 of the Summercrest Subdivision. (R at 703, ¶ 5.) Mr. Merrill could see from where he lived the lots around Lot 223 and the road that runs in front of Lot 223 – "Summercrest Drive." (R at 703, ¶ 6.) In approximately the Spring or Summer of 1993, Mr. Merrill saw much construction activity going on in the area above his house and in the area of Lot 223. The entire face of the

[3] This survey is the source of Cole's pre-development contour/elevation map, which is attached hereto as Exhibit B, and which shows what the land looked like before Appellee began development.

land was changed dramatically with much heavy machinery. Mr. Merrill also saw Summercrest Drive put in. (R at 703, ¶ 7.)

Also, Mr. Merrill recalls a ravine which existed before the construction work and which ran right through Lot 223. (R at 703, ¶ 8.) He used to ride through this ravine when he was a kid. (R at 703, ¶ 9.) However, the ravine was filled in during the development work described above and became Lot 223. Id. Consistent with filling in the ravine, James Patterson (principal of Appellee's partner, Patterson Construction) testified that lots in the Summercrest Subdivision sometimes contained fill from a "pushover." (R at 703, ¶ 10.)

Chain of Title Facts

Prior to all this development, Appellee and Patterson Construction obtained the land in question as "joint tenants with full rights of survivorship" *via* a quit claim deed on April 27, 1993. (R at 702, ¶ 13.) The land in question remained in the joint names of Appellee and Patterson Construction throughout the development of the Summercrest Subdivision. (R at 702, ¶ 14.) After the land in question was platted, Appellee and Patterson Construction both conveyed their joint interests in Lot 223 to GT. Investments on October 10, 1995. (R at 702, ¶ 15.) Appellee first conveyed his interest to Patterson Construction (recorded on October 11, 1995 at 4:23pm), and then Patterson conveyed its interest to GT Investments (recorded *one minute later*) on October 11, 1995 at 4:24pm.

(R at 702, ¶ 18.) Before or after title was conveyed to GT Investments, neither Patterson Construction nor Appellee ever disclosed to GT Investments that Lot 223 was covered with uncompacted fill, or that the lot had formerly been a ravine that was filled in during development. (R at 701, ¶ 19.) Finally, GT Investments conveyed Lot 223 to Appellants on August 26, 1996 – ten months after it had purchased Lot 223 from Appellee and Patterson Construction. (R at 701, ¶ 21.)

Facts regarding Recent Status of House

After experiencing massive cracking and other settlement-related damage to the foundation of their house, Appellants hired Earthtec to conduct an investigation. As part of this investigation, Earthtec's lead engineer, Rick Chesnut, compared the pre-Summercrest Subdivision elevations provided by Cole Engineering with elevations from a current survey done by Earthtec. (R at 701, ¶¶ 22-23.) This elevation comparison, attached hereto as Exhibit C, shows that Appellants' house rests partially on deep fill soils – as much as 14 feet deep – which are inadequate to support the house. (R at 701, ¶ 24.) Summercrest Drive was cut into the original hill side and fill from the road was placed or moved onto Lot 223. (R at 700, ¶ 26.) Mr. Chesnut concluded, based on geotechnical testing (which he supervised), survey information, photographs and reports of other experts, that the uncompacted fill on Lot 223 was placed or moved thereto during the development of the Summercrest Subdivision. (R at 700, ¶ 27.) According to Mr.

Chesnut, the uncompacted fill is a primary cause of the settling experienced by Appellants' house. (R at 700, ¶ 28.)

Appellants hired another professional engineer, Robb Edgar, to conduct a geotechnical consultation of their house in February of 2000 because of significant signs of settlement. (R at 700, ¶¶ 29-30.) According to on-site inspections, U.S.G.S. maps,[4] and U.S. Agricultural Department aerial photographs taken of the property in 1959, 1965, 1980, and 1993 (see, Exhibits D and E for the latter two photographs),[5] Mr. Edgar concluded (similar to Mr. Chesnut) that the footing subgrade material under portions of Appellants' house consists of improperly compacted fill. (R at 700, ¶ 31.) He based this conclusion on the pre-development aerial photographs, the 1993 aerial photograph, and the Earthtec drawings/comparison which show the cut and fill that resulted in uncompacted soil being placed on Lot 223. (R at 700, ¶ 35.) Finally, according to Messrs. Edgar and Chesnut, the fill soil on Lot 223 was moved onto that lot at the time the road was constructed in 1993, as shown in the 1993 photograph. (R at 699, ¶ 36.)

---

[4] Based on the Lehi Quadrangle 7.5 minute map of the area prior to development and the 1980 and 1993 aerial photographs (attached as Exhibits D and E, respectively), the south corner of Appellants' house is located on the downhill side of the original slope. (R at 700, ¶ 32.)

[5] The 1993 U.S. Agriculture Department aerial photograph depicts much disturbed soil on Lot 223 as the road in question is being constructed in the Summercrest subdivision. (R at 699, ¶ 33.) It also shows that the slope that existed below the Lot 223 area (as depicted in the pre-development photographs) has been filled in.

Appellants' house rests upon this uncompacted soil, which Messrs. Edgar and Chesnut conclude is, in large part, the source of the settling experienced by Appellants. (R at 699, ¶ 37.)

IV. SUMMARY OF ARGUMENT

The trial court erred in awarding Appellee summary judgment against Appellants' causes of action for *negligent misrepresentation*, *fraudulent concealment* and *negligence* because (1) according to Utah caselaw negligent misrepresentation does not require contractual privity between the developer and the home-buyer; (2) fraudulent concealment, just like negligent misrepresentation, also does not require contractual privity between the developer and the home-buyer, but rather requires a duty to disclose material facts to those who trust them, have less knowledge than them, or to those who rely on them. Also, Utah public policy militates in favor on imposing a duty to disclose between developers and third-party home-buyers. Finally, the trial court erred because (3) developers owe third-party home-buyers a duty of care based on caselaw from Utah and other jurisdictions.

V. ARGUMENT

A. THE COURT BELOW ERRED WHEN IT HELD THAT NEGLIGENT MISREPRESENTATION REQUIRES CONTRACTUAL PRIVITY BETWEEN THE DEVELOPER AND THE HOME-BUYER

Appellee's first summary judgment argument was that Appellants' negligent misrepresentation cause of action fails because Appellants, as third parties, were not privy to any contract with Appellee. This Court, however, has repeatedly held otherwise.

In Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, Inc., 713 P.2d 55, 59 (Utah 1986), a negligent surveyor argued that its obligations ran only to the general contractor – the party with whom it had contracted to survey a shopping center site.[6] Id. at 59. Just like Appellee, the Price-Orem surveyor asserted that because the owner of the site was not in privity of contract with the surveyor, it had no standing to sue the surveyor for negligent misrepresentation. Id. In holding that privity was irrelevant for a negligent misrepresentation claim, the Price-Orem court explained:

> Rollins, Brown fundamentally misconceives the nature of this case. Price-Orem's action alleges **the tort of negligent misrepresentation and is neither derived from nor dependent upon its having rights under the contract between JPA and Rollins, Brown.**"

Id. (Emphasis added); see also, Klinger v. Kightly, 889 P.2d 1372, 1378 (Utah App. 1995). The Price-Orem court later concluded in regard to the plaintiff's negligent

---

[6] In Price-Orem, the surveyor (RBG) contracted with contractor (JPA) who built a shopping center for the third-party owner (Price-Orem).

misrepresentation claim at, "Privity of contract is not a necessary prerequisite to liability." Id. at 59 (citing Christenson v. Commonwealth Land Title Insurance Co., 666 P.2d 302, 307 (Utah 1983)). The Christenson court continues the same refrain:

> **Even without privity, however, one negligently making a false statement may be held liable**. A recent case in point is Dugan v. Jones, Utah, 615 P.2d 1239 (1980). There the third-party plaintiffs were real estate purchasers who had been told by the third-party defendant, a real estate agent, that the property they were purchasing comprised 22 3/4 acres, when in fact it comprised only 6.9. **We held that a claim for relief for negligent misrepresentation lies in tort against third parties to a real estate transaction**.

Id. at 305. (Emphasis added). Thus, according to Price-Orem, Klinger, and Christenson, privity of contract is irrelevant to a claim for negligent misrepresentation.

Appellee claims in regard to Appellants' negligent misrepresentation cause of action that he "was not in a superior position to know any facts regarding the construction of the house." (R at 695.) Of course Appellee was not in a position to know the facts regarding *the house construction*. That's not why Appellants have sued Appellee. Appellee was sued because he owned the property in question while the grading and improvements occurred,[7] no construction or improvements had taken place on the property in question prior to Appellee's improvements,[8] Appellee did all the road grading

---

[7] In his deposition, Appellee acknowledged buying the land from Peck *with Patterson.* (R at 695, n 7.)

[8] Dan Frandsen testified that when they began grading, they were grading into virgin country – i.e. no one had developed there before. (R at 695, n 8.)

and utility improvements on Summercrest Drive, Appellee had years of experience in developing property and is a licensed contractor and developer. (R at 695.) Finally, circumstantial evidence imputes knowledge to Appellee from his grading the road in question and filling in the nearby ravine with excess grading fill which later became Appellants' lot.[9]

Consequently, Appellee was certainly in a superior position to know the material facts underlying the property.[10] Such was the conclusion of the Klinger court: "we conclude Calder 'was in a **superior position to know the material facts**,' id. **A licensed professional surveyor, Calder--unlike the laymen third-party plaintiffs--had the training and experience to verify the survey results**." Klinger, 889 P.2d at 1379 (emphasis added).

---

[9] Besides Messrs. Chestnut and Edgar's expert testimony (as professional engineers) clearly implicating Appellee (see, *Material Facts* above), Mr. Merrill, who grew up in the area to the South of and below the Summer Crest Development, testified that the ravine in question existed up until Appellee's construction grading, and said the ravine was filled in during the construction. (See, *Material Facts* above).

Additionally, Appellee's partner, Mr. Patterson, explained that no one else could have accounted for any of the disturbed-looking soil around Lot 223. (R at 695, n 9.)

[10] Appellee, Dan Frandsen, and even James Patterson go to such great lengths to distance themselves from the facts underlying the uncompacted fill that they completely contradict their own stories, which in and of itself, should create an issue of a material fact: Dan Frandsen testified that because of the deep cuts they made, he had a lot of excess dirt which he had hauled off in dump trucks. (R at 694, n 10.). Appellee testified to the exact opposite. He stated that the cut was not deep and that he didn't recall having excess dirt from the cut. Id. James Patterson even acknowledged sometimes having fill on the lots. Id.

B. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' FRAUDULENT CONCEALMENT CLAIM BECAUSE FRAUDULENT CONCEALMENT, JUST LIKE NEGLIGENT MISREPRESENTATION, DOES NOT REQUIRE CONTRACTUAL PRIVITY BETWEEN THE DEVELOPER AND THE HOME-BUYER

Appellee, leaning against the same straw house he built with contractual privity against Appellants' negligent misrepresentation cause of action, again claims that contractual privity is required for Appellants to maintain their cause of action for fraudulent concealment. And again, just as with negligent misrepresentation, this Court has held otherwise.

1. Utah Caselaw Imputes to Developers a Duty to Disclose Material Facts to Those Who Trust Them, Have Less Knowledge Than Them, or to Those Who Rely on Them

In Utah, the fraudulent concealment cause of action requires:

> **one with a legal duty or obligation to communicate certain facts remain silent or otherwise act to conceal material facts known to him. Such a duty or obligation may arise from a relationship of trust between the parties, an inequality of knowledge or power between the parties**, or other attendant circumstances indicating reliance. . . . Such '[c]oncealment or nondisclosure becomes fraudulent only when there is an existing fact or condition ... which the party charged is under a duty to disclose.'

McDougal v. Weed, 945 P.2d 175, 179 (Utah App. 1997) (citation omitted) (emphasis added). Nowhere does the McDougal court require contractual privity between the parties. Instead, the McDougal court looks at a duty to disclose that arises from a relationship of trust or inequality of knowledge between the parties to establish this cause

of action.[11]

This Court in Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987) elaborated on a developer's duty to disclose. The Loveland court held that a land developer owes a duty to the purchaser to disclose deficiencies that are not easily discernible during ordinary and reasonable investigation and to disclose conditions which the developer *knows or should know* and which makes subdivided lots unsuitable for residential building. Id. at 769-70. Clearly, Appellants had no way to know how uncompacted the soil was beneath their house – soil which, according to two licensed professional engineers, a neighborhood observer, photographs and maps, could have only been placed there by Appellee. (R at 692.)

By contrast, the court in DeBry v. Valley Mortgage, 835 P.2d 1000 (Utah App. 1992) explained that a duty to speak will *not* be found "'where the parties deal at arm's length, and where the underlying facts are reasonably within the knowledge of both parties.'"[12] Id. at 1007 (citations omitted). Again, the underlying facts regarding the

---

[11] For a comparison of the disparate knowledge between the parties, see page 13-14 below.

[12] The DeBry court held there was not a duty to speak under a fraud theory because there were no special circumstances alleged which created such a theory:

> The DeBrys do not claim Valley Mortgage made false representations, only that it failed to disclose information to them about the building which it knew or should have known. There is nothing in the pleadings to indicate Valley Mortgage was in a better position than were the DeBrys, to have access to the relevant information, or that precluded the

condition of the soil underneath Appellants' house were clearly not within the knowledge of Appellants when they purchased the property.[13]

In support of his claim that Appellants' fraudulent concealment cause of action fails due to a lack of contractual privity, Appellee claims that all material information related to the lot "was disclosed by [Appellee] to Patterson Construction. Additionally, the backfill compaction complained of by [Appellants] is not a material fact which was known by [Appellee]." (R at 691.) Contrary to this factually unsupported claim, Appellee:

- owned the land that became Lot 223[14]
- graded Summercrest Drive,[15]
- hired engineers to survey and stake the land,[16]

DeBrys from seeking the information.

DeBry, *supra*, 835 at 1007. Contrast the facts behind the DeBry court's holding with the nearly opposite facts underlying Appellants' fraudulent concealment claim.

[13] Indeed, GT Investments, which bought Lot 223 from Appellee and his partner inspected the lot as Appellants' house was being constructed and was unable to determine that the lot contained uncompacted fill. (R at 901, n 15.)

[14](R at 704, ¶ 1; 702, ¶ 13.)

[15](R at 703, ¶ 6.)

[16](R at 691, n 17.)

➢put in the road improvements,[17] and

➢sold the lot to GT. Investments.[18]

Furthermore, Mr. Merrill testified that at this time Appellee filled in the ravine,[19] and Mr. Patterson testified that Appellee had in the past left fill on some lots.[20] Thus, according to Messrs. Merrill, Patterson and the expert engineers,[21] Appellee must have known or should have known the material fact that the lot sold to GT. Investments/Appellants was full of uncompacted soils.

Thus, nowhere in Utah caselaw is a contractual nexus required for the fraudulent concealment cause of action. Instead, a duty to disclose based on a relationship of trust or inequality of knowledge between the parties is required (and which exists) in the present case.

---

[17](R at 691, ¶ 18.)

[18](R at 695, n 7.)

[19](R at 691, n 19.)

[20] Mr. Patterson acknowledged sometimes having fill on the lots: "Q: Did you ever run into any fill on any of the other lots? A: Yeah. Yeah, there's some that we have fill, you know, from a pushover." (R at 690, n 20.)

[21] Mr. Chesnut, Appellants' geotechnical engineer, concluded that, based on geotechnical testing (which he supervised), survey information, photographs and reports of other experts, the fill soils on Lot 223 where placed or moved thereto during the development of the Summercrest Subdivision. (R at 700, ¶ 27.) According to geotechnical engineers Edgar and Chesnut, the uncompacted soil on Lot 223 was moved there at the time the road (that runs in front of Lot 223) was constructed in 1993, as shown in the 1993 photograph. (R at 699, ¶ 36.)

2. Other Jurisdictions Also Hold a Developer Liable for Defective Conditions

Caselaw from other jurisdictions and secondary authorities encountering similar situations to the one at bar have imposed a duty on a vendor/developer to a third party based on the vendor/developer's fraudulent concealment of a dangerous condition.

The general rule in the context of personal injury, of course, is that a vendor of real estate is not liable for injuries caused to "a purchaser or **third person** caused by a defective condition of the premises existing at the time the purchaser takes possession." Emile F. Short, Annotation, Liability of Vendor or Grantor of Real Estate for Personal Injury to Purchaser or Third Person Due to Defective Condition of Premises, 58 A.L.R.3d 1027, § 3 (2002) (emphasis added) (citations omitted). Exceptions, however, exist.

The first exception to the general nonliability rule is when a dangerous condition existed at the time the vendee took possession which the vendor concealed or failed to disclose to the vendee. Id. at § 4a; see also, Restatement (Second) of Torts § 353. Such liability extends not only to the vendee, but to third parties who might have also been injured by the condition concealed by the vendor. Id.

Another exception to the general nonliability rule is when the dangerous condition was created by the vendor. Id. at § 4b. Again, such liability extends not only to the vendee, but also to third parties. Id.

Although the context of the above rule and its two notable exceptions is in regard

to personal injury rather than injury to property, the principle that a vendor should be held accountable for his intentional and fraudulent conduct *vis-vis* a third-party applies regardless of whether the injury be to person or property. In other words, just as the cases in the above ALR impute liability to the vendor for *personal* injury caused to a third party by the vendor's intentional deception, the same rationale supports a vendor's liability for fraudulently concealing a condition that injures a third-party's *property*.

One case that indeed holds a vendor (developer) liable for fraudulently concealing a condition that injured the property of a third-party is Lawson v. Citizens and Southern National Bank of South Carolina, 180 S.E. 2d 206 (S.C. 1971), where a man purchased a residential lot from the defendant-developer and built a house thereon and later conveyed the house to his ex-wife as part of a divorce settlement. Subsequently, she (the third-party) discovered that the house "had been build over a ravine, which had been filled with unsuitable material by the defendant . . ." Id. at 208. She and her former-husband filed a complaint against the developer. The complaint charged that:

> the defendant in developing and subdividing its land into lots to be sold for residential use only, filled an enormous gulley [sic] with stumps and other rubble to a depth of twenty to twenty-five feet and concealed this fill by covering it with soil.

Id. The Lawson defendant demurred to the complaint which was sustained by the circuit court. Id. However, on appeal, the South Carolina Supreme Court reversed the demurrer, holding:

> We have no precedent in our decisions involving nondisclosure of an artificially created, and concealed, unstable condition of land sold. However, courts elsewhere, applying settled principles, have consistently found a duty to disclose in landfill cases on analogous facts. [Citations omitted].
>
> We are satisfied that the facts alleged in this complaint are sufficient to support an inference of fraudulent concealment;

Id. at 208-09. In regard to Mrs. Lawson's third-party status, the Lawson court held that, "The cause of action for general and special damages ripened in Mr. Lawson upon completion of the dwelling, and defendant's liability was unaffected by his subsequent conveyance of the premises [to Mrs. Lawson]." Id. at 209; see also, Tillis v. Smith Sons Lumber Co., 188 Ala. 122, 130-31 (1914) (holding that the fact that the defendant in an action for deceit was not a party to the contract which he induced by his fraudulent representations did not affect his liability in damages for the difference between the actual and the represented value of the property received by the plaintiff in the transaction).

Thus, caselaw in other jurisdictions, along with secondary authority, illustrate the liability courts have imputed to a vendor/developer for his fraudulent concealment of a dangerous condition that injures a third-party or the property of the third-party.

3. Utah Public Policy Also Militates in Favor on Imposing a Duty to Disclose Between Developers and Third-Party Home-Buyers

Utah land developers should owe future home-buyers a duty to disclose pursuant to McDougal and Loveland. Utah is undergoing an unprecedented amount of construction and growth due to the influx of families and workers into the state. Accordingly, the

situation encountered by Appellants will undoubtedly be experienced by an increasing number of home-buyers who often put substantial amounts of money into purchasing a new house – even their entire savings. Meanwhile, there is nothing stopping unsavory developers from developing parcels of land with uncompacted fill (and thus cannot support a house) because home-buyers do not ordinarily contract with the developers.

Home-buyers thus have little recourse against the developer who is often the party with the greatest amount of knowledge regarding the condition of a parcel he has developed. Home-buyers thus indirectly rely on the developers to provide lots suitable for the very purpose for which they are developed – to support a house. Thus, according to the superior knowledge enjoyed by developers regarding the conditions of a lot and the trust indirectly placed on them by future home-buyers, developers should owe home-buyers a duty to disclose all conditions material to the parcel of land at issue.

According to Appellee and the trial court, even if a developer is caught filling in a ravine red-handed, the developer cannot be held liable to the future home-buyer. Does the Court want to set this kind of precedent in construction defect cases?

C. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' NEGLIGENCE CAUSE OF ACTION BECAUSE DEVELOPERS OWE THIRD-PARTY HOME-BUYERS A DUTY OF CARE ACCORDING TO CASELAW FROM UTAH AND OTHER JURISDICTIONS

Finally, Appellee argued below that Appellants' negligence cause of action fails because "[Appellee] did not owe [Appellants] a duty of care." (R at 690.) The following caselaw, however, refute this claim.

This Court in Loveland, *supra*, addressed this issue – to wit, whether developers (like Appellee) owe a duty of care to third-party home-buyers (like Appellants) who were not privy to the developer/builder agreement. In its analysis, the Loveland court looked to Anderson v. Bauer, 681 P.2d 1316 (Wyo. 1984) where "a defendant developer purchased raw acreage and subdivided the same into residential building lots. These lots were in turn sold to defendant builders who constructed houses thereon that were later purchased by eight plaintiff owners." Loveland, 746 P.2d at 769. The Anderson court held:

> The developer ought to also have responsibility for his activities. . . . Thus, it is reasonable that, where land is subdivided and sold for the purpose of constructing residential dwelling houses, **the developer has a duty to exercises reasonable care** to insure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house and **he must disclose to his purchaser any condition which he knows or reasonably ought to know makes the subdivided lots unsuitable for such residential building**.

Anderson, 681 P.2d at 1323 (quoted in Loveland, 746 p.2d at 769) (emphasis added). The Loveland court approvingly noted that, "The duty defined by the Wyoming court [in Anderson] and our interpretation thereof **is consistent with existing Utah law**."

Loveland, 746 P.2d at 769 (emphasis added). The Loveland court also mentioned U.C.A. § 57-11-17(1), whose provisions "persuasively" fashion the duty of a developer to his vendees:

> (1) Any person who:
> * * *
> (c) in disposing of subdivided lands, omits a material fact required to be stated in a registration statement, public offering statement, statement of record or public report, necessary to make the statements made not misleading;
> is liable as provided in this section to the purchaser unless, in the case of an untruth or omission, it is proved that the purchaser knew of the untruth or omission or that the person offering or disposing of subdivided lands did not know and in the exercise of reasonable care could not have known of the untruth or omission.

Thus, Loveland, Anderson, Stepanov v. Gavrilovich,[22] and UCA § 57-11-17(1) all support the idea that a developer indeed owes a third-party home-buyer a duty of care regarding dangerous conditions (which he knows of or should know of) on the property he develops.

Appellee nevertheless argues that "Plaintiff cannot show that the road, utilities, curb, gutter, sidewalks caused a crack in the foundation of the Property." (R at 688.) Appellee simply attempts to obfuscate the critical point: fill generated from his grading of the road in question was pushed over into a nearby ravine according to two engineering

---

[22] 594 P.2d 30 (Alaska 1979) (relied upon by the Anderson court and cited approvingly in Loveland at 770).

experts, photographs, maps, and a lay bystander. Upon this filled-in ravine was built Appellants' house.

VI. CONCLUSION

Based on the foregoing, the trial court's award of summary judgment was improper and should be reversed. The Court should accordingly remand Appellants' claims for fraudulent concealment, negligent misrepresentation and negligence back to the trial court for further disposition.

RESPECTFULLY SUBMITTED this 11 day of July, 2002.

HILL, JOHNSON & SCHMUTZ, L.C.

STEPHEN QUESENBERRY
Attorneys for Appellants

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 11 day of July 2002, they caused a true and correct copy of the foregoing Appellants' Brief to be delivered to the following:

Michael W. Homer
Jesse C. Trentadue
Thomas B. Price
Suitter Axland
175 South West Temple, Suite 700
Salt Lake City, UT 84101-1480

Sent Via:
✓ Hand -Delivery
_____ Facsimile
_____ Mailed (postage prepaid)

stacie roh

EXHIBIT "A"

Michael W. Homer (#1535)
Jesse C. Trentadue (#4961)
Thomas B. Price (#8254)
SUITTER AXLAND
175 South West Temple, Suite 700
Salt Lake City, UT 84101-1480
Telephone: (801) 532-7300

Attorneys for Defendants Mel Frandsen dba Mary Mel Construction Co.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

STEVE and CATHERINE SMITH, individuals, Plaintiffs, vs. PATTERSON CONSTRUCTION, INC., a Utah corporation; JOSEPH SHARP, an individual; GT INVESTMENTS, MEL FRANDSEN dba MARY MEL CONSTRUCTION CO., Defendants.	***ORDER GRANTING SUMMARY JUDGMENT* WITH RESPECT TO DEFENDANT MEL FRANDSEN dba MARY MEL CONSTRUCTION CO.** Case No. 000402150 Judge Fred D. Howard

---

On October 31, 2001, Defendant Mel Frandsen d/b/a Mary Mel Construction Co.'s *Motion for Summary Judgment* came on for a regularly scheduling hearing before the honorable Fred D. Howard. Plaintiffs Steve and Catherine Smith were represented at that hearing by Stephen Quesenberry of Hill, Johnson & Schmutz L.C. and Defendant Mel Frandsen d/b/a Mary Mel

Construction Co. was represented by Jesse C. Trentadue of Suitter Axland. The Courting having fully considered the arguments of counsel, the submissions of the parties, the applicable legal authority and good cause appearing therefor:

1. **IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT** Defendant Mel Frandsen's d/b/a Mary Mel Construction Co.'s *Motion for Summary Judgment* is granted;

2. **IT IS FURTHER ORDERED ADJUDGED AND DECREED THAT** with respect to the claims asserted against Mel Frandsen d/b/a Mary Mel Construction Co. Plaintiffs' *Second Amended Complaint* is dismissed with prejudice; and

3. **IT IS FINALLY ORDERED ADJUDGED AND DECREED THAT** the parties shall bear their respective costs and attorney's fees.

DATED this _____ day of November, 2001.

Honorable Fred D. Howard
District Court Judge

Approved as to form:

Stephen Quesenberry, Esq.
HILL, JOHNSON & SCHMUTZ L.C.
Attorney for Plaintiff Steve & Catherine Smith

Jesse C. Trentadue
Suitter Axland
Counsel for Defendant Mel Frandsen
d/b/a Mary Mel Construction Co.

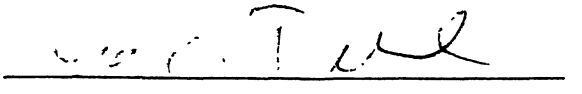
CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2001, a true and correct copy of the foregoing ***ORDER GRANTING SUMMARY JUDGMENT* WITH RESPECT TO DEFENDANT MEL FRANDSEN dba MARY MEL CONSTRUCTION CO.** was served by first-class United States mail, postage pre-paid, to:

Stephen Quesenberry, Esq.
HILL, JOHNSON & SCHMUTZ L.C.
Jamestown Square
3319 North University Avenue, Suite 200
Provo, UT 84604
Attorneys for Plaintiff

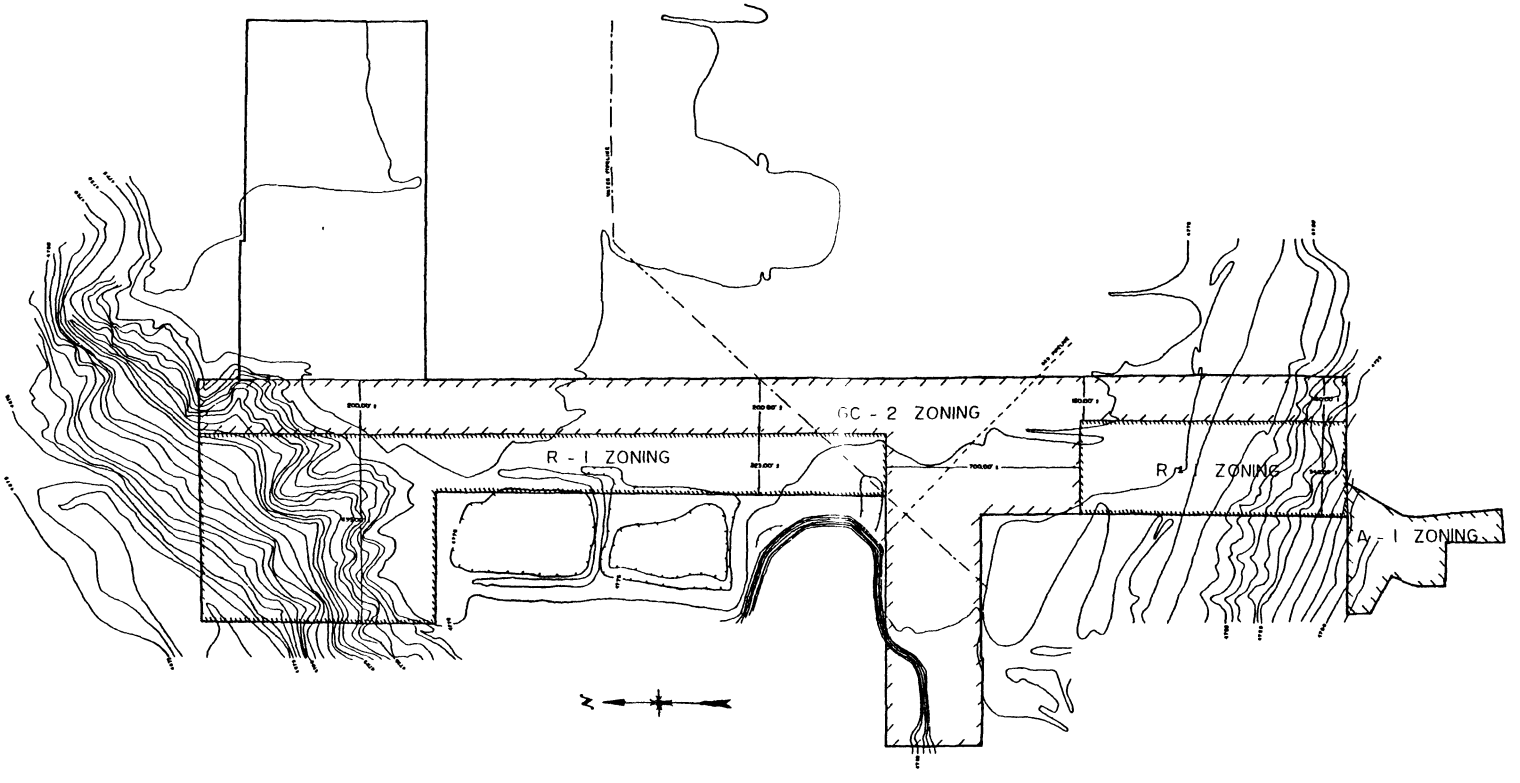
William J. Hansen, Esq.
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, UT 84144
Attorneys for Patterson Construction, Inc.

Barbara K. Berrett, Esq.
WEISS BERRETT PETTY, L.C.
50 South Main Street, Suite 530
Salt Lake City, UT 84144
Attorneys for Joseph Sharp and GT Enterprises



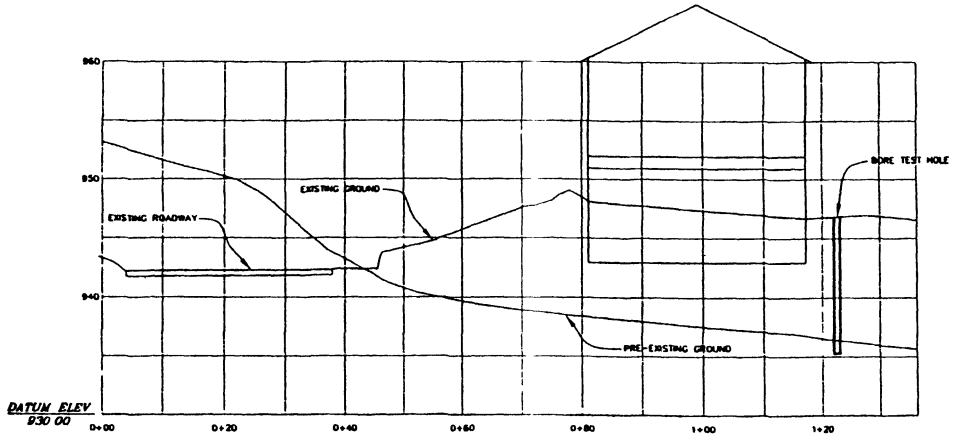
G:\6837\20\Order Granting Summ Judg wpd

EXHIBIT "B"



PRESENT ZONING MAP

EXHIBIT "C"



(24"x36")
SCALE 1" = 10'
(11"x17")
SCALE 1" = 20'

DESIGNED BY:	DATE:
DRAWN BY:	DATE:
CHECKED BY:	DATE:
APPROVED:	DATE:
CORD FILE	DATE:

HUBBLE ENGINEERING, INC.
ENGINEERING—SURVEYING—PLANNING
1471 N 1200 W
OREM UTAH 8405
(801) 802-8992

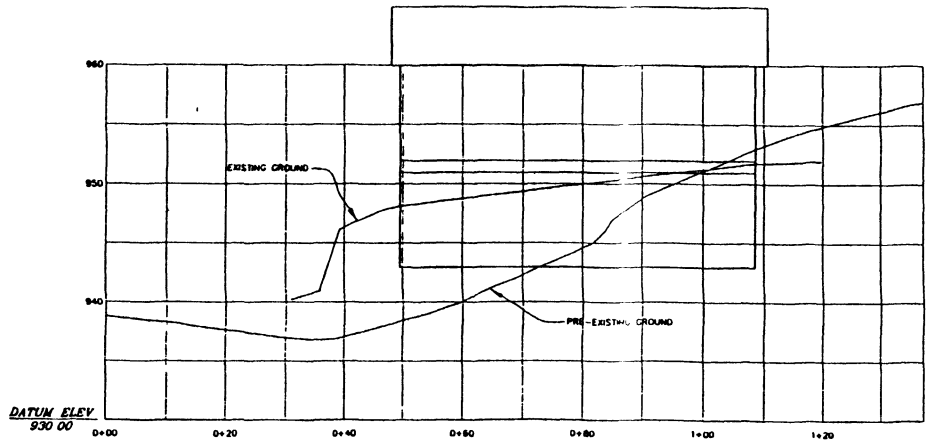
SUMMERCREST LOT #223

CROSS SECTION B–B

LEHI, UTAH

JOB NO 3-01-213

SHEET NO 3



(24"x36")
SCALE 1" = 10'
(11"x17")
SCALE 1" = 20'

DESIGNED BY:	DATE:	
DRAWN BY:	DATE:	
CHECKED BY:	DATE:	
APPROVED:	DATE:	
CORD FILE	DATE:	

HUBBLE ENGINEERING, INC.
1471 N 1200 W
OREM UTAH 8405
(801) 802-8992

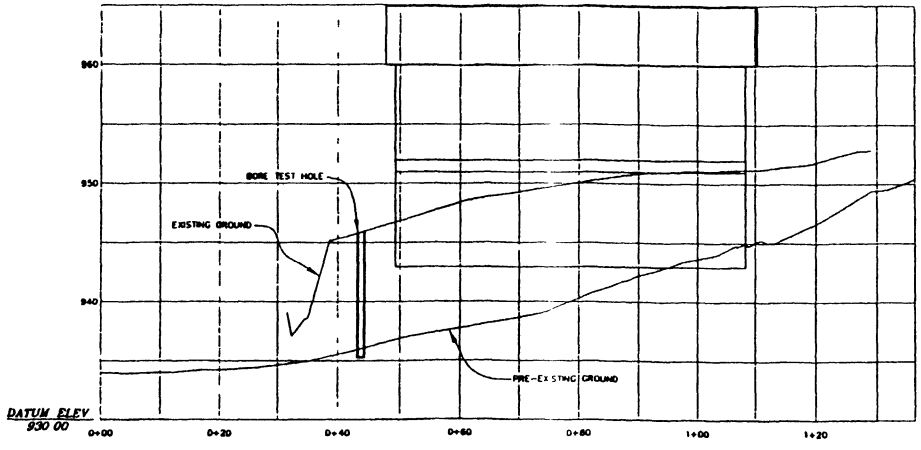
SUMMERCREST LOT #223

CROSS SECTION A-A

LEHI, UTAH

JOB NO 3-01-213

SHEET NO 2



(24"x36")
SCALE 1" = 10'
(11"x17")
SCALE 1" = 20'

REVISIONS	BY	DATE

DESIGNED BY: DATE
DRAWN BY: DATE
CHECKED BY: DATE
APPROVED: DATE
COORD FILE: DATE
REV. COORD FILE: DATE

P:\2 SR Summercrest Lot 223\Drawings\TOPO.dwg 03/18/01 12:15:46 PM MDT

HUBBLE ENGINEERING, INC.
ENGINEERING—SURVEYING—PLANNING
1471 N 1200 W
OREM UTAH 840?
(801) 802-8992

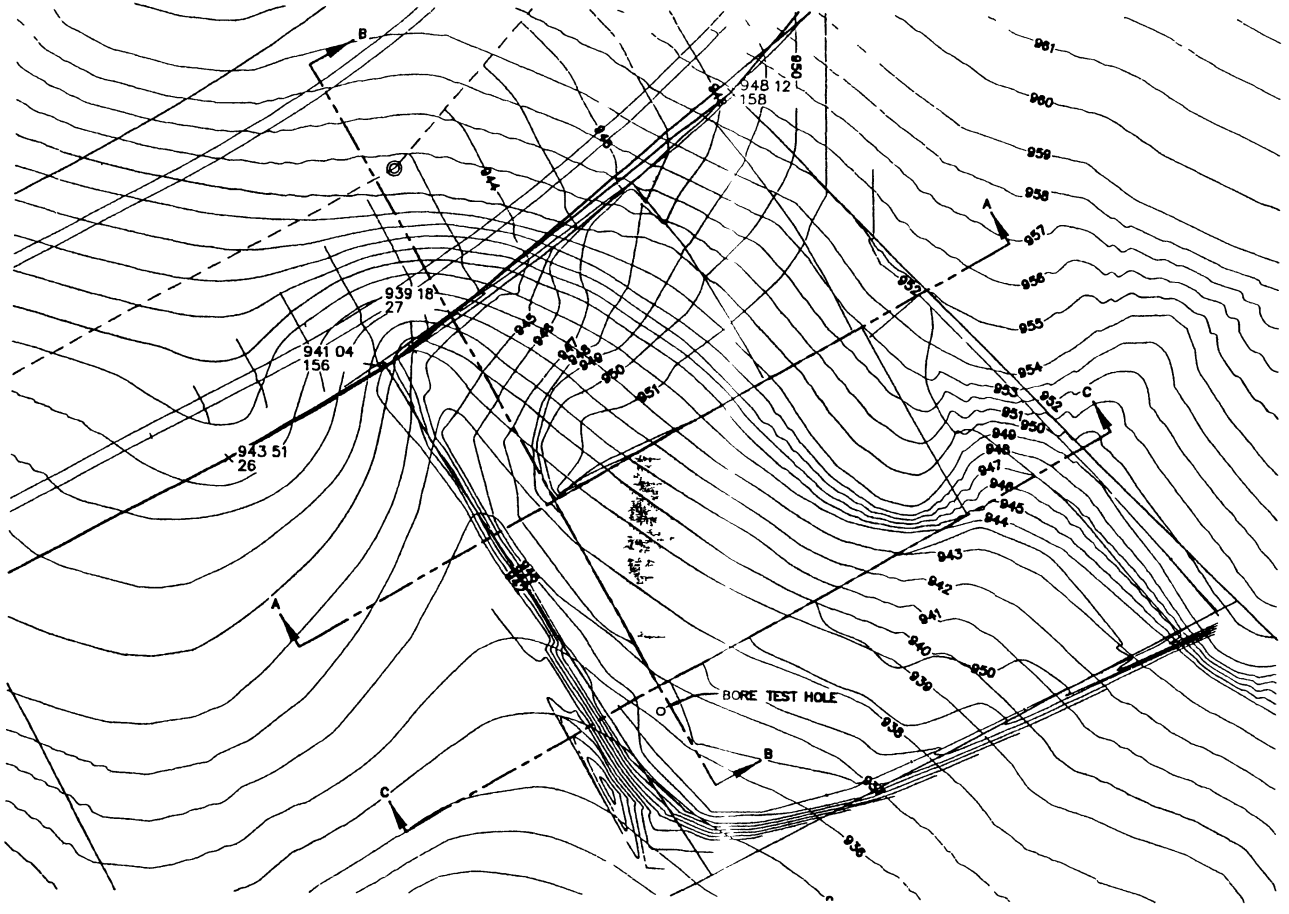
SUMMERCREST LOT #223

CROSS SECTION C—C

LEHI, UTAH

JOB NO 3-01-213

SHEET NO 4



N

(24"x36") SCALE 1" = 10'

(11"x17") SCALE 1" = 20'

LEGEND

PRE-EXISTING CONTOURS MAJOR

PRE-EXISTING CONTOURS MINOR

FINISHED GROUND CONTOURS MAJOR

FINISHED GROUND CONTOURS MINOR

	DESIGNED BY:	DATE
	DRAWN BY:	DATE
	CHECKED BY:	DATE
	APPROVED:	DATE
	COAD FILE	DATE

HUBBLE ENGINEERING, INC
1471 N 1200 W
OREM UTAH 84057
(801) 802-8992

SUMMERCREST LOT #223

PLAN VIEW

LEHI, UTAH

JOB NO 3-01-213

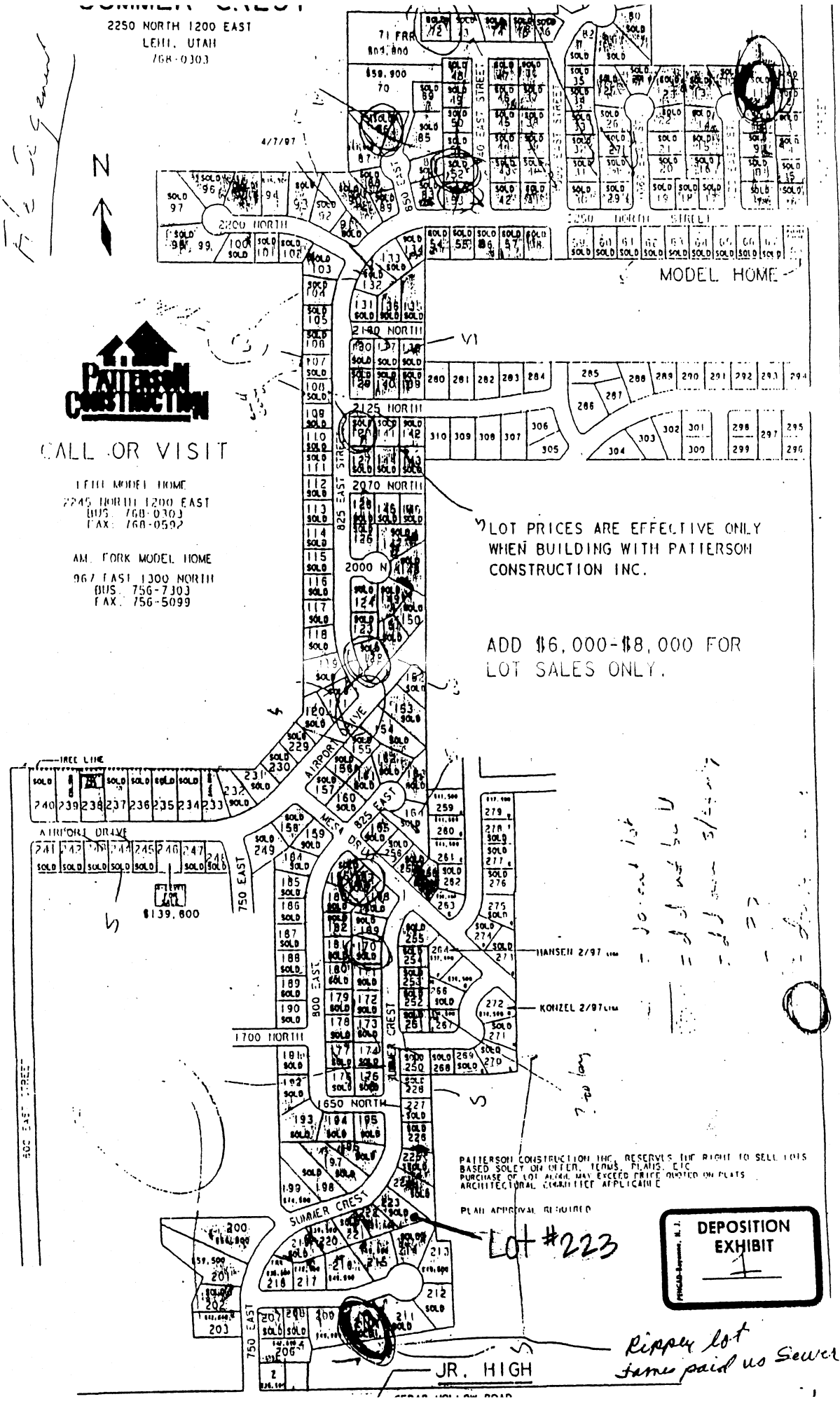
SHEET NO 1

EXHIBIT "D"


KODAK SAFETY FILM
KODAK SAFETY FILM

EXHIBIT "E"

EXHIBIT "F"


2250 NORTH 1200 EAST
LEHI, UTAH
768-0303
N
MODEL HOME
PATTERSON CONSTRUCTION
CALL OR VISIT
LEHI MODEL HOME
2245 NORTH 1200 EAST
BUS. 768-0303
FAX. 768-0592
AM. FORK MODEL HOME
967 EAST 1300 NORTH
BUS. 756-7303
FAX. 756-5099
LOT PRICES ARE EFFECTIVE ONLY WHEN BUILDING WITH PATTERSON CONSTRUCTION INC.
ADD $6,000-$8,000 FOR LOT SALES ONLY.
2250 NORTH STREET
2200 NORTH
2140 NORTH
2125 NORTH
2070 NORTH
2000 N
1700 NORTH
1650 NORTH
825 EAST STREET
800 EAST
750 EAST
AIRPORT DRIVE
SUMMER CREST
TREE LINE
$139,800
HANSEN 2/97
KONZEL 2/97
PATTERSON CONSTRUCTION INC. RESERVES THE RIGHT TO SELL LOTS BASED SOLEY ON OFFER. TERMS, PLANS, ETC. PURCHASE OF LOT ALONE MAY EXCEED PRICE QUOTED ON PLATS
ARCHITECTURAL COMMITTEE APPROVAL
PLAN APPROVAL REQUIRED
Lot #223
DEPOSITION EXHIBIT
1
Ripley lot
James paid us Sewer
JR. HIGH